Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

WALKER L. CHANDLER

SHARON T. HARRIS

JAMES D. WALKER

Petitioners

VS.

HONORABLE ZELL D. MILLER

MAX CLELAND

JAMES G. LEDBETTER

Respondents.

On Petition for A Writ Of Certiorari

To the United States Court Of Appeals

For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does Georgia O.C.G.A. § 21-2-140, that allows suspicionless searches of candidates for political office, violate the Forth Amendment under the guidelines set out in *Von Raab*.

2. Is the establishment of such a drug-testing scheme as is set forth in O.C.G.A. § 21-2-140 a content-based restriction on free expression as well as an unconstitutional restriction upon the rights of voters to chose their elected officials, thus, violating the First Amendment of the U.S. Constitution?

LIST OF ALL PARTIES TO THE PROCEEDINGS

All Parties are named in the caption.

There is no parent or subsidiary company to be listed.

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A. An important governmental interest and a narrowly tailored statute designed to fit the requirements of the governmental interest are required before suspicionless searches are allowed so as to be tolerated by the Fourth Amendment.

B. Georgia Code § 21-2-140 was not drafted for a compelling or important government need, but was merely designed for the purpose of placating the electorate for placing an unconstitutional burden on government employees with the unconstitutional O.C.G.A. § 45-20-90.

II. The drug testing scheme violates the First Amendment in its effect of establishing a certain ideology as a qualification for holding public office, thus resulting in content based restriction on free speech. Such restriction is abhorrent to the First Amendment.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

_____

No. _____

_____

WALKER L. CHANDLER; SHARON T. HARRIS; JAMES D. WALKER

Petitioners,

versus

ZELL D. MILLER, Governor; MAX CLELAND, Secretary of State; JAMES G. LEDBETTER, Commissioner Department of Human Resources State of Georgia,

Respondents

_____

PETITION FOR WRIT OF CERTIORARI

INTRODUCTORY PRAYER

Appellants Walker L. Chandler; Sharon T. Harris; and James D. Walker pray this Court to grant their petition for certiorari to review an adverse decision by the United States Court of Appeals for the Eleventh Circuit.

CITATIONS TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported at 73 F.3d 1543.

The decision of the United States District Court in the Northern District of Georgia is an unreported decision.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on January 22, 1996, The Court of Appeals denied petition for rehearing on April 26, 1996.. This Court has jurisdiction to issue the requested writ of certiorari

under 28 U.S.C. 1254(1) because appellants seek review of an adverse decision rendered by the United States Court of Appeals for the Eleventh Circuit. .

US CONSTITUTIONAL PROVISIONS

U.S. Constitution,

First Amendment - Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourth Amendment - Unreasonable searches and seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported By Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATUTORY PROVISIONS INVOLVED

O.C.G.A. 21-2-140 O.C.G.A. 21-20-90

STATEMENT OF CASE

A. Factual Background

Plaintiffs-Appellants Walker Chandler, Sharon Harris, and James D. Walker respectfully petitioned for rehearing, and suggested rehearing en banc, of the panel decision in *Chandler, et al v. Miller*, 73 F.3d 1543 (11th Cir. 1995) which was denied on April 18, 1996.

In May of 1994, and prior to filing their notices of candidacy for statewide political office and their "drug-free" certificates and paying their qualifying fees, plaintiffs filed this action in the district court. Therein they challenged the constitutionality of the O.C.G.A. § 21-2-140 requirement that they submit certificates showing that they had submitted to urine testing and that such testing had proved negative for the presence of illegal drugs.

After hearing oral argument, the district court issued an order (June 21, 1994) denying Plaintiff's motion for a

preliminary injunction. On January 31, 1995, the district court entered a consent order and final judgment incorporating its findings of law which it included in its order of June 21. Plaintiffs-Appellants appealed.

The three-judge panel of the eleventh circuit Court of appeals, in a 2-1 decision, affirmed the judgment of the district court. *Id.* The holding that the law requiring the suspicionless drug-testing of candidates does not violate either Fourth or First Amendment guarantees conflicts with the district court's ruling in *Georgia Association of Educators v. Harris*, 749 F.Supp. 1110 (1990), as well as with the logic set forth by the Supreme Court in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed. 2d 685 (1989), *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 , 109 S.Ct 1402 (1989), and *Veronia School District 47J v. Acton*, ____U.S.____, 115 S. Ct. 2386 (1995).

B. Basis of Jurisdiction in the Court of First Instance.

28 U.S.C. 1331, 1243, 2201, 2202, and 42 U.S.C. 1983 et. seq.

REASONS FOR GRANTING THE PETITION

I. The decision of Court of Appeals is in conflict with the Supreme Court as to the applicable analysis of the federal constitutional right to be free from suspicionless search as set out in Von Raab and other related cases.

The case at bar is a case of first impression. While the analysis to this case and the general rule of law is set out in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384 (1989) and other cases, the Eleventh Circuit Court of Appeals in this case, unlike *Von Raab*, provides a constitutional ruling allowing the suspicionless search of a candidate for public office. This type of search goes well beyond suspicionless searches of: 1) government employees involved in drug interdiction, 2) public transportation employees where error on their part could result in great harm to many people, 3) minors held in a custodial environment subject to immediate danger, or 4) an important governmental interest that can not be served by ordinary methods of law enforcement. The Court has specified parameters under which a warrantless, suspicionless search is allowed. A compelling

or important governmental interest that can not be served by ordinary methods of law enforcement and a statute narrowly drawn to provide for the specific governmental interest are requirements of a warrantless, suspicionless search. These requirements have not been met in the case at bar.

A. An important governmental interest and a narrowly tailored statute designed to fit the requirements of the governmental interest are required before suspicionless searches are allowed so as to be tolerated by the Fourth Amendment.

Judge Barkett of the Eleventh Circuit states in her dissent,

> As the majority recognizes, there is no question that the mandatory drug testing in this case is an unreasonable search prohibited by the Fourth Amendment unless it is required by 'special governmental needs

> beyond the normal need for law enforcement, and those needs outweigh the candidates' privacy interests.'

Chandler, et al v. Miller, 73 F.3d 1543,1549 (11th Cir. 1995), *quoting National Treasury Employees v. Von Raab*, 489 U.S. 656, 665-66, 109 S.Ct. 1384, 1390-91 (1989) *(citing Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 109 S.Ct. 1401, 1413-14 (1989). The Georgia statute, O.C.G.A. § 21-2-140, is a violation of the Fourth Amendment, and special circumstances are required for such a search to be allowed under the U.S. Constitution. As Judge Barkett states in her dissent, one of the overriding issues in this case is:

> [W]hether Fourth Amendment protections can be constitutionally suspended when there is no individualized suspicion, when there is no immediate or direct threat to public safety, when those being

> searched are not directly involved in the frontlines of drug interdiction, when there is no institutional setting involved such as a prison or public school requiring swift and informal discipline, and when there are no dire consequences as a result of waiting to obtain a warrant if a candidate, or anyone else for that matter, is suspected of violating the law.'

Chandler, 743 F.3d at 1550.

The Court has clearly found circumstances where searches that normally violate the Fourth Amendment can constitutionally proceed. The Court in *Von Raab* found there was an immediate or direct threat to public safety and that those being searched were directly involved in the frontlines of drug interdiction or carrying weapons, so that suspicionless searches were allowed. In *Veronia School District 47J v.*

Acton, ____ U.S. ___, 115 S.Ct. 2386 (1995) , again such searches were allowed where the Court found an institutional setting was involved such as a prison or public school requiring swift and informal discipline, and that dire consequences could occur as a result in waiting to obtain a warrant. But in the case at bar, no such dire consequences would result upon waiting to obtain a warrant if a candidate is suspected of violating the law. The panel majority in *Chandler*, found no special need in this situation that can not be served by ordinary law enforcement or the voting public. Judge Barkett states in her dissent,

> The majority frames its analysis in terms of whether 'unlawful drug use is . . . fundamentally incompatible with high state office.'

Chandler, 743 F.3d at 1550. While this statement may be true, the Georgia legislature or the panel majority fail to show that normal law enforcement methods will not serve any need required by the people and government of the candidate, and,

more to the point, they fail to show any special circumstance that justifies disregarding the political candidates constitutional rights. An important special governmental need must be present to encroach on the right guaranteed by the Fourth Amendment of the U.S. Constitution. See *Chandler*, 743 F.3d at 1550; *Von Raab*, 489 U.S. 656. Further, one could argue an important interest exists that voters should know whether candidates are in good health and intelligent, so that voters would know the candidates can serve their whole term in office and that they will not be distracted or adversely affected in doing their elected duty. The government could test candidates for aids, mental illness, other physical illness and intellectual capacity. If the circumstances in the case at bar are ones considered special circumstances that justify suspicionless searches, the next logical step is to test for drug and alcohol abuse of anyone associated with the government or any sort of activity where the person could potentially cause harm. Under this logic the Fourth Amendment has become meaningless.

In *Skinner*, 489 U.S. at 622, 631, 109 S.Ct. at 1419, 1420-21 (1989) , the court demonstrated a special governmental need

of railway safety and that ensuring this safety was beyond normal law enforcement, so suspicionless searches were allowed in this case. In *Skinner*, the work of government employees involved the "discharge of duties fraught with risks of injuries to others that even a momentary lapse of attention can have disastrous consequences.' *Id.* at 628, 109 S.Ct. at 1419. The Court in Skinner noted that this was a situation where drug and alcohol abuse were specifically related to serious train accidents proven in past railway history. Id. at. 606-608, 109 S.Ct. at 1407-08. The use of individualized suspicion was inadequate to prevent the great harm produced by railroad accidents. Id. at 622, 631, 109 S.Ct. at 1416, 1420-21.

Further, in *Von Raab*, 489 U.S. at 678-79, 109 S.Ct. at 1393, the Court allowed for the suspicionless urine testing for those involved directly in drug enforcement or those carrying firearms. The Court explicitly recognized the compelling reason for the suspicionless searches:

> A drug user's indifference to the Service's basic mission, or, even worse, his active complicity with malefactors, can facilitate importation of sizable drug shipments or block apprehension of dangerous criminals.

Von Raab, 489 U.S. at 670, 109 S.Ct. at 1393. The Court further recognized that "the public should not bear the risk that employees who may suffer from impaired perception or judgment who will be promoted to positions where they may need to employ deadly force." Id. at 671, 109 S.Ct. at 1393.

Finally, in *Veronia School District 47J v. Acton*, ___ U.S. ___, 115 S.Ct. 2386 (1995) the Court found a special government need in randomly testing school children and that testing was limited to athletes where these children could suffer immediate physical harm in their athletic activity. In this situation the Court allowed this encroachment on the Fourth Amendment by a statute that was narrowly tailored to children involved in athletics in a custodial situation where imminent harm was possible due to the activity within the custodial situation.

No such similar compelling or important government interests can be found in the present case, and any concern raised can be addressed by ordinary law enforcement. No such immediate threats exits in Chandler, similar to that in *Van Raab*, *Skinner*, or *Veronia*. The political candidates have a much greater expectation of privacy than someone involved in drug interdiction, railway transportation or children in a custodial setting subject to serious injury. If the voters are unhappy with the wall of privacy erected by a candidate, they may simply choose not to elect him. Even though a candidate may relinquish much of his or her privacy by choosing to run for political office, it should not include relinquishing one's 4th amendment right to be free from unreasonable

search. See Chandler, 73 F.3d at 1551. No problem exists as to normal law enforcement methods in serving this need. Therefore, no substantial need exist for encroachment on citizen and candidate's Forth Amendment right.

B. Georgia Code § 21-2-140 was not drafted for a compelling or important government need. It was adopted purely for symbolic reasons as companion legislation to O.C.G.A. § 45-20-90, held unconstitutional by this Court.

O.C.G.A. § 45-20-90, which required drug testing of all government employees and was struck down by the district court in Ga. Ass'n of Educators v. Harris, 749 F.Supp. 1110 (N.D. Ga. 1990), gave birth to O.C.G.A.§ 21-2-140 which is challenged here in a case of first impression. Clearly, the Georgia lawmakers, eager to prove themselves not above the impositions they so readily put upon others and eager to escape "drug test" challenges during elections, passed both laws. Chandler, 73 F.3d at 1552-53; Edith M. Shine Legislative Review, 9 Ga. St. U. L. Rev. 212, 218 (1992). As Judge Barkett's dissent states, "this search is more a symbolic gesture than an effective tool to ferret out drug-users or assure exemplary public officials. Surely symbolic gestures are not enough to trump the constitutional imperatives of the Fourth Amendment or the right to participate in government." *Chandler*, 73 F.3d at 1552-53. In striking down O.C.G.A. § 45-20-90, the court, in Ga. Ass'n, carefully read *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed. 2d 685 (1989), and held,

inter alia, that,

> Defendant's position is untenable because neither *Von* Raab nor its progeny recognize such a generalized interest as sufficiently compelling to outweigh an individual's Fourth Amendment rights.

Ga. Ass'n., 749 F.Supp. at 1114.

The denial of individual liberty in the case at bar is no inconsequential matter:

> Not only is privacy surrounding an individual's bodily functions at stake in this case, but all the rights associated with participating in a democracy -- rights of association, freedom of speech, ballot access, and the right to cast an effective ballot. We are not dealing with the denial of job opportunity, but with our democratic form of Government.

Chandler, 73 F.3d at 1552. In light of the interference with the above named liberty interests, giving the governmental interests the greater

weight is especially unreasonable. To do so is to live in a world other than one in which the U.S. Constitution is the supreme law of the land.

II. The drug testing scheme violates the First Amendment in its effect of establishing a certain ideology as a qualification for holding public office, thus resulting in a content based restriction on free speech. Judge Barkett of the Eleventh Circuit clearly recognized the First Amendment problem, writing,

> The majority's justification for suspending the requirements of the Fourth Amendment is the state's interest in office holders who are "drug free," "honest[], clear sighted[], and clear thinking," as well as "ensuring that elected officials are 'persons appreciative of the perils of drug use' and '[] sympathetic to the interdiction efforts'

Chandler, 73 F.3d at 1550. Ironically, the panel majority has spelled out the reason why this statute violates the First Amendment, yet they still maintain that it is valid. The effect of the statute is to mandate what the political candidates are to think and believe. Judge Barkett writes:

> By conditioning holding public office upon submission to drug screening, however, the Georgia legislature effectively bans from positions of political power not only those who might disagree with the current policy of criminalizing drug use, but also those who challenge the intrusive governmental means to defeat such among its citizenry. This statute is neither neutral or procedural, but, in the majority's own characterization attempts to ensure only candidates with a

> certain point of view qualify for office.

Chandler, 73 F.3d at 1552.

The assertion that candidates must be appreciative of the perils of drug use and that they be sympathetic to interdiction efforts is similar to the logic which the General Assembly attempted to employ in its effort to keep Julian Bond from serving in the Georgia House of Representatives -- logic which was rejected in *Bond v. Floyd*, 385 U.S. 116, 87 S.Ct. 339, (1966). Bond's speaking out against the war in Vietnam was characterized by the majority of the panel below as being "pure free speech". It could very well be said--as it was -- that Bond's utterances "gave aid and comfort to the enemy", and were thereby tantamount to treason. Libertarian candidates stand in the same position as Bond, in not endorsing a policy supported by those in the General Assembly. Similarly, the Libertarian Party's forthright stand against the failed "War on Drugs" and the widespread growth of governmental power and intrusiveness which has proliferated in its wake is well known. For Georgia politicians to attempt to have libertarian and limited-government candidates

tamely to submit to suspicionless drug testing is to attempt to force them to abandon their principles:

> Establishing a certain ideology as a 'qualification' for holding public office appears to be a content-based restriction on free expression.[5] Drug policy is a politically charged issue confronting many government officials who have disparate points of view regarding the 'Drug War' and the efficacy of the means employed in fighting it. It is the function of public office holders to write, enforce, and interpret the laws. By conditioning holding public office upon submission to drug screening, however, the Georgia legislature effectively bans from positions of political power not

> only those candidates who might disagree with the current policy criminalizing drug use, but also those who challenge the intrusive governmental means to detect such use among its citizenry.

Chandler, 73 F.3d at 1552.

This statute is patently offensive to the First Amendment. It strikes at the heart of our First Amendment protection: requiring a political candidate to adhere to a specific point of view -- a specific doctrine. The purpose of this statute has been shown clearly not to ferret out drug users or assure exemplary public officials, but merely for a symbolic measure. *Chandler*, 73 F.3d at 1552-53; Edith M. Shine Legislative Review, 9 Ga. St. U. L. Rev. 212, 218 (1992).

III. O.C.G.A. § 21-2-140 violates the Thirteenth Amendment and the equal protection clause of the Fourteenth Amendment.

O.C.G.A. § 21-2-140 is little more than a requirement to submit oneself to a badge of servitude as a prerequisite to seeking public office. It is constitutionally suspect under the Thirteenth Amendment, notwithstanding the fact that so many thousands of Georgians are willing to label themselves thusly as people willing to submit to the government's symbolic edict. That edict is also constitutionally suspect under the Fourteenth Amendment in that it purports to bar from office those who use illegal drugs--even if those drugs were taken in other states or other countries and were therefore not taken in violation of Georgia law. Similarly there is a serious Equal Protection question inherent in the fact that the alcohol-and-tobacco-using majority is attempting to decree that only those who use their drugs may even attempt to run for public office.

The synergistic effects of this statute in the unjustified violation of 1) an individual's Fourth Amendment right to free from unreasonable search, 2) the First Amendment rights of association and freedom of speech, and 3) the interference with the right of ballot access and to right to cast an effective ballot make Georgia Code Section 21-2-140 completely repugnant to the U.S. Constitution

CONCLUSION

Petitioner respectfully requests the Court to grant this petition, issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit and reverse its decision.

Respectfully submitted,

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APPENDICES

In The United States Court Of Appeals

For The Eleventh Circuit

No. 95-8230

D. C. Docket No. 1:94-CV-1298-ODE

WALKER L. CHANDLER; SHARON T. HARRIS;

JAMES D. WALKER

Plaintiffs-Appellants,

versus

ZELL D. MILLER, Governor; MAX CLELAND,

Secretary of State; JAMES G. LEDBETTER,

Commissioner Department of Human

Resources State of Georgia,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(January 22, 1996)

Before Edmonson, DUBINA AND BARKETT, Circuit Judges.

EDMONSON, Circuit Judge:

In 1990, the Georgia legislature enacted O.C.G.A. § 21-2-1401 The offices to which the statute applies include, among others, those of the Governor, Lieutenant Governor, Secretary of State, Attorney General, the heads of several agencies, all state judges in courts of general jurisdiction, and all state legislators. Id. § 21-2-140 (a) (4). Plaintiff-appellants are members of the Libertarian Party seeking the offices of Lieutenant Governor, Commissioner of Agriculture, and member of the House of Representatives.

As the language quoted in the margin indicates, anyone who declines to take the test, or who tests positive, is basically barred from holding office. Additional aspects of the drug-testing scheme were outlined by the district court: testing may, at the option of the candidate, be performed either at an approved medical testing laboratory or at the office of the candidate's physician.

Laboratory procedures concerning privacy follow the Mandatory Guidelines for Federal Workplace Drug Testing Programs, set out at 53 Fed. Reg. 11,979 (1988). The test is

designed to reveal the presence or absence of the indicia of five illegal drugs. No information unrelated to drug use is contemplated by the statute; the test simply indicates that the candidate tested positive or negative.

The appellants' arguments comprise three identifiable claims.[2] First, appellants argue the tests violate the Fourth Amendment prohibition on unreasonable searches and seizures. Second, appellants categorize the statute as affecting the Fourteenth Amendment rights of candidates to run and of voters to choose them. Third, they categorize their refusal to submit to the test as a protected speech act that cannot, under the First Amendment, be the basis for barring a candidate from the ballot.

II

That the tests at issue are searches within the meaning of the Fourth Amendment seems settled. See Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 617, 109 S.Ct. 1402, 1413, 103 L.Ed.2d 639 (1989). Like the test at issue in National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d. 685 (1989), this test "is not designed to

serve the ordinary needs of law enforcement." 489 U.S. at 666; 109 S.Ct. at 1391. That is, the test is not designed to prosecute crime: no party before us contends otherwise. Special needs are involved. In this circumstance, the courts must "balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." 489 U. S. at 665-66, 109 S.Ct. at 1390-91. Another federal appeals court considering suspicionless drug testing has noted that "Von Raab's balancing test is inherently, and doubtless intentionally, imprecise. The Court did not purport to list all of the factors that should be weighed or to identify which factors should be considered more weighty than others." Willner v. Thornburgh, 928 F.2d. 1185, 1187 (D.C. Cir. 1991).

No Federal Court seems to have entertained Fourth Amendment challenge to a state law requiring testing of candidates for high state office. Thus we observe at the outset the special concerns affecting the Von Raab balancing test where the state's interest is in setting qualifications for its own officers.

American history is especially important in a case like this one;

and the Supreme Court observed nearly a century ago:

> It is obviously essential to the independence of the States, and to their peace and tranquillity, that their power to prescribe the qualifications of their own officers . . . should be exclusive and free from external interference, except so far as plainly provided by the Constitution of the United States.

Taylor v. Beckham, 178 U.S. 548, 570-72, 20 S.Ct. 890, 898, 44 L.Ed.2d 1187 (1900)' (cited in Gregory v. Ashcroft, 501 U.S. 452, 460, 111 S.Ct. 2395, 2400, 115 L.Ed.2d 410 (1991). In the light of this command, we regard the states as entitled to considerable deference in the characterization of their own interests.

Under the Skinner-Von Raab framework, the state's interest is calculated mainly by reference to two factors: the level of documented evidence of a past problem and the fundamental inconsistency of drug use with the demands of the position. In Skinner, the Court approved suspicionless drug testing where

there was a documented showing of widespread substance abuse among employees in the position to be subjected to testing. 489 U.S. at 607, 109 S.Ct. at 1407-08.

In Von Raab, the Customs office did not demonstrate a past of drug abuse among the employees to be tested. The Court approved the search anyway, however, when confronted with evidence that physical and ethical demands on customs agents were so great as to render drug use totally incompatible with the nature of the position. 489 U.S. at 669-70, 109 S.Ct. at 1393. Thus, because Georgia has not argued that her elected officials have in the past abused drugs, the issue on Georgia's interest is whether unlawful drug use is similarly fundamentally incompatible with high state office.

We think that to ask this question is also to answer it. The people of Georgia place in the trust of their elected officials that which people value most highly: their liberty, their safety, their economic well-being, ultimate responsibility for law enforcement, and so on. The Supreme Court has recognized that ":drug abuse is one of the most serious problems confronting our society today," Von Raab, 489 U.S. at 674, 109 S.Ct. at 1395, and

therefore has approved the drug testing of Customs officers in part because "the national interest (in eradicating drug use) could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics." 489 U.S. at 670, 109 S.Ct. at 1393. That said, it follows, even more forcefully, that those vested with the highest executive authority to make public policy in general and frequently to supervise Georgia's drug interdiction efforts in particular must be persons appreciative of the perils of drug use.[3]

But drug use poses significant dangers beyond rendering elected officials unsympathetic to drug interdiction efforts. The nature of high public office in itself demands the highest levels of honesty, clear-sightedness, and clear thinking. For example, the Lieutenant Governor is the President of the Senate and has other executive duties posed by law; more important, though, the Lieutenant Governor is to replace the Governor should the top executive office become vacant. O.C.G.A. § 45-12-7. The Governor must respond to state emergencies, id. § 45-12-30, and if necessary call out the state militia. Id. § 45-12-27; 45-12-28. He can direct state law enforcement agencies. See O.C.G.A. §§ 35-3-8.1; 35-2-23(b). The Governor has broad powers of appointment to important offices, boards, commissions, and so

forth. See generally id. § 45-12-50; see also Ga. Const. Art. I., § 2, par. 1 (Governor appoints members of State Board of Pardons and Paroles). It goes without saying that clear judgment is imperative to the position. Likewise, members of the House of Representatives enact laws of general applicability for the state, while the Commissioner of Agriculture leads an agency with broad regulatory powers. See generally id. § 2-2-7 (Commissioner of Agriculture); Ga. Const. art. III (House of Representatives). The positions are particularly susceptible to the 'risks of bribery and blackmail against which the Government is entitled to guard." Von Raab, 4890 U.S. at 674, 109 S.Ct. at 1395. Simply put, the state's interest in filling these positions with drug-free people is great.[4]

Also, we note that our conclusion is strengthened by our deferential reading of Georgia's appraisal of its own interests. Evaluating the governmental interest is necessarily a policy-based inquiry; and while the importance of electing officials whose probity and judgment are unclouded by the use of unlawful drugs may be self-evident to us, we--whatever our own view might be--would be slow to disregard Georgia's appraisal of that need in the light of cases like Taylor, supra, reminding us that a state's

sovereign interests are at stake.

Against Georgia's interests must be balanced plaintiff-appellants' privacy interests. The Supreme Court in Skinner, 489 U.S. at 626, 109 S.Ct. at 1418, noted that drug tests "require employees to perform an excretory function traditionally shielded by great privacy," and Justice Scalia wrote in Von Raab that the drug tests there were "particularly destructive of privacy and offensive to personal dignity." 489 U.S. at 680, 1090 S.Ct. at 1398 (Scalia, J., dissenting).

But, we think that the intrusion here is even less than that approved in Von Raab. Here, the test can be taken at the office of the candidate's physician, whereas in Von Raab, the test had to be taken in the company of an (auditory) observer employed by an "independent contractor." Other aspects bearing on the individual's interests are similar to those approved in Von Raab. The district court noted that federally-approved privacy guidelines, such as those at 53 Fed. Reg. 11,979 et seq. (1988), serve as the benchmark for laboratory procedures. The test reveals only the presence or absence of the indicia of the use of

illegal drugs. The results are not made available to law enforcement officers in the event a candidate chooses not to file them (if taken through one's own physician, no state agent need know that the test was administered). And, much like the Customs agents whose privacy expectations are diminished because physical conditioning and ethical behavior are central to job performance, see Von Raab, 489 U.S. at 679, 19 S.Ct. at 1398, candidates for high office must expect the voters to demand some disclosures about their physical, emotional, and mental fitness for the position.

Because the governmental interests of the state of Georgia outweigh the intrusions on privacy effected by the challenged testing, we hold that O.C.G.A. § 21-2-140, as applied to the appellants, does not violate the Fourth Amendment.

Appellants also contend that by barring from the ballot a class of persons (those who refuse to take drug tests), the Georgia legislature has violated the rights of the candidates to run for office and the people to vote for whom they please. In their briefs and at argument, appellants indicated they would characterize the Fourteenth Amendment as creating a nearly

absolute barrier to excluding a defined group of persons from the ballot. The Supreme Court, however, has rejected that argument, most recently in Gregory v. Ashcroft, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). There, the court recognized Missouri's prerogative to exclude from the ballot most candidates for the state judiciary over a mandatory retirement age of seventy-years. The Court acknowledged that when states bar a class of candidates from the ballot, the Equal Protection Clause provides a check on such state authority,: but cited Article IV, section 4 and the Tenth Amendment for the proposition that our scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives. This rule is no more than a recognition of a State's constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders." 501 U.S. at 462, 111 S.Ct. at 2402 (citations and internal quotation marks omitted).

Gregory guides us in our disposition of the appellants' equal protection claim. There, the Court held that rational basis scrutiny applies to state electoral qualifications not involving a suspect

classification. 501 U.S. at 470, 111 S.Ct. at 2406. Under rational basis scrutiny, courts "will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." Vance v. Bradley, 440 U.S. 93, 97, 99 S.Ct. 939, 943, 59 L.Ed.2d 171 (1979).

Considering the importance of the mental, emotional, and physical health of high public officials, we cannot conclude that the Georgia legislature acted irrationally. Also, the Georgia statute creates less of a barrier than the one upheld in Gregory: whereas Missouri judicial candidates past the mandatory retirement age were permanently barred from the ballot, Georgia candidates are only barred so long as they cannot (or will not) demonstrate that they are drug-free. Thus we hold that O.C.G.A. § 21-2-140 does not improperly infringe on the rights of people to run and of voters to choose the candidate of their choice.

IV

Appellants' First Amendment claim is based on their assertion that the "refusal tamely to submit to the government's drug

testing edict is itself a protected free speech act similar in nature to refusing to salute a flag or the king's hat set upon a post in the village square." We read this argument as an appeal to the rationale of cases like Communist Party of Indiana v. Whitcomb, 414 U.S. 441, 94 S.Ct. 656, 38 L.Ed.2d 635 (1974), which invalidated a state statute conditioning ballot access on the filing of an affidavit disavowing the overthrow of state and national governments, and Bond v. Floyd, 385 U.S. 116, 87 S.Ct. 339, 17 L.Ed.2d 235 (1966), which held that exclusion of a member of the Georgia House of Representatives based on his stated opposition to the Vietnam war violated the First Amendment. We think these cases are distinguishable in that they involve pure speech acts, divorced from unlawful conduct.

In that respect, this case is more like United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), where the court upheld against a First Amendment challenge the prosecution of a young man who burned his draft card, ostensibly in an effort to persuade others to oppose the Vietnam War. There, the Court states, "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled speech whenever the person engaging in the conduct intends thereby to express an idea." 391 U.S. at 376, 88 S.Ct. at 1678. The Court went on, however, to entertain the "assumption that the alleged

communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment." Id. Against this backdrop, the Court held that government regulation of conduct containing "speech and nonspeech" elements is "sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 377, 88 S.Ct. at 1679.

Georgia's drug-testing statute passes muster under the framework of O'Brien. First, it is generally within the power of the State of Georgia to prescribe qualifications for its elected officials. See Gregory, 501 U.S. at 463, 111 S.Ct. at 2402.

Second, the statute furthers a substantial governmental interest, as described in the Fourth Amendment analysis above.

Third, the government's purpose is not suppression of free expression. The purpose, as we concluded above, is ensuring that high public officials to whom immense responsibilities are

entrusted possesses the judgment, probity, and alertness required of them. Anyway, it is doubtful whether the statute has even the effect, let alone purpose, of restricting speech rights. We think an audience would much more clearly perceive the intended message of one who burns a draft card than the message of one who declines to take a drug test. See generally Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294, 104 S.Ct. 3065. 3069, 82 L.Ed.2d 221 (1984) (noting that First Amendment protection of conduct depends on whether conduct "would reasonably be understood by the viewer to be communicative').

Fourth, the regulation is no more restrictive of expression than is necessary. If Georgia's goal is to preclude the nomination or election of people addicted to drugs then it must require, rather than simply advise, that prospective candidates submit to testing. Appellants have not suggested a less restrictive way for Georgia to accomplish it stated objective of keeping drug users out of office. Therefore, we conclude that whatever impact the Georgia statute has on speech does not violate the First Amendment.

V

No party contends in this appeal that the drug testing in this case is for normal law enforcement. The controversy is about Georgia's rights and the special need Georgia believes it has to take a step to deter illicit drug users from filling important state offices. Especially in the light of federalism and the Tenth Amendment, we are cautions in interfering with the states on matters central to their governance.[5] O.C.G.A. § 21-2-140 does not violate the First, fourth, or Fourteenth Amendment rights of candidates for high office in Georgia; we affirm the judgment of the district court.[6]

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[1]O.C.G.A. § 21-2-140 provides:

At the time a candidate for state office qualifies for nomination or election, each such candidate shall file a certificate . . . stating that such candidate has been tested for illegal drugs . . . and that the results of such test are negative. . . . No candidate shall be allowed to qualify for nomination or election to a state office unless he or she presents such certificate . . . .

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[2]Appellants' brief refers to almost every right enumerated in the Constitution. Many of these textual provisions are touched on only in passing, with no citations of authority. The district court focused exclusively on appellants' Fourth Amendment claim, and Appellants asserted at argument here that they chiefly advanced their First and Fourteenth Amendment claims. We regard all federal constitutional arguments except these (First, Fourth, and Fourteenth Amendments) as either abandoned or without merit.

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[3]The Von Raab situation might be distinguished on the basis that Congress can define the Customs Department's mission and demand sympathy to that mission as a condition of employment, whereas the executive officers here are members of a branch coequal to the Georgia legislature. We regard this distinction as involving a pure question of state law.

Appellants asserted in their complaint that the testing violates the Georgia Constitution, but the district court decided no issues of state law. 28 U.S.C. § 1367 provides that the district courts "may decline to exercise supplemental jurisdiction over a claim which they otherwise have power to hear if "the claim raises a

novel or complex issue of state law . . . ." Id. The decision jot to exercise supplemental jurisdiction is reviewed for abuse of discretion. Faucher v. Rodziewicz, 891 F.2d 864, 872 (11th Cir. 1990). In view of the complex state constitutional issues presented here and the interests of comity in this sensitive area of federal-state relations, we cannot conclude the district court abused its discretion. See, e.g., Grant v. Seminole County, Fla., 817 F.2d 731, 732, (11th Cir. 1987) finding no abuse of discretion where district court failed to explain dismissal of discretion where district court failed to explain dismissal of state claim, because "[e]xercising pendent jurisdiction over the claim would have required the district court to decide a novel question of state law . . ."). We also decline to decide the issues of state law raised by appellants.

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[4]Appellants contend that because the test is administered after substantial notice, drug users may simply discontinue their indulgence for a brief period before testing and, thus, defeat the purpose of the test. They say the testing is just ineffective. But, in balancing the Fourth Amendment interests, there is no requirement that a search be the single most effective one a

legislature could design. Also, as the Supreme Court noted in Von Raab, "addicts may be unable to abstain for even a limited period of time, or may be unaware of the 'face-away effect' of certain drugs." 489 U.S. at 676, 109 S.Ct. at 1396 (citations omitted). Persons who would be caught by Georgia's limited testing would seem to be people who are out of control about drugs; these worst cases might be the most dangerous in public office. The testing is not so ineffective as to be unreasonable or irrational in itself.

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[5]By the way, Georgia publishes almost no official legislative history. And, we do not accept an academic law journal's summary of a post-enactment telephone interview (not conducted under oath) with a single legislator (even one of the sponsors of a bill) as competent legislative history. See, e.g., Blanchette v. Connecticut General Ins. corps., 419 U.S. 102, 132, 95 S.Ct. 335. 353. 42 L.Ed.2d 320 (1974) (rejecting use of "subsequent legislative history" because "[P]ost-passage remarks of legislators, however explicit, cannot serve to change the legislative intent . . . . Such statements represent only the

personal view of these legislators."). Nor do we--on the basis of such "history"--accept that Georgia's drug testing law is merely or chiefly symbolic, although that which is symbolic may still have great significance. In their brief, plaintiff-appellants cited to no such law review summaries; and we think they--given the lack of true legislative history available--were right not to do so.

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[6]We are aware that qualifying to run for the pertinent public offices is only a few months away. We also recognize that plaintiff-appellants will likely seek review of our decision. For that reason, we have tried to be expeditious in announcing the decision. Because speed seems important, we have perhaps not said all that we could--especially about history; but we think we have said enough to indicate our general point of view.

BARKETT, Circuit Judge, dissenting:

As the majority recognizes, there is no question that the mandatory drug testing in this case is an unreasonable search prohibited by the Fourth Amendment unless it is required by 'special governmental needs beyond the normal need for law enforcement," and those needs outweigh the candidates' privacy

interests. National Treasury Employees v. Von Raab, 489 U.S. 656, 665-66, 109 S.Ct. 1384, 1390-91 (1989) (citing Skinner v. Railway labor Executives' Ass'n, 489 U.S. 602, 109 S.Ct. 1401, 1413-14 (1989)). I dissent because I do not believe that the suspicionless search in these circumstances serves any special governmental need beyond the normal need for law enforcement, and, if it did, I believe that the candidates' privacy interests outweigh the governmental interests when the factors of Von Raab are properly considered.

Before balancing the candidates' privacy expectations against the government's interests in conducting suspicionless drug-screening, the court must first ascertain whether this case presents a special governmental need beyond the normal need for law enforcement.[1] In simpler terms, before the court can balance the competing interests in this case, it must first ask what is so impractical about requiring a warrant or individualized suspicion in the circumstances presented here. It is in this threshold inquiry that I believe the majority first errs.

The majority frames its analysis in terms of whether "unlawful drug use is . . . fundamentally incompatible with high state

office." Certainly, the answer to that question is patently obvious, but the question assumes unlawful drug use.[2] This case is not about the incompatibility of drug use and elected office, but rather about whether Fourth Amendment protections can be constitutionally suspended when there is no individualized suspicion, when there is no immediate or direct threat to public safety, when those being searched are not directly involved in the frontlines of drug interdiction, when there is no institutional setting involved such as a prison or public school requiring swift and informal discipline, and when there are no dire consequences as a result of waiting to obtain a warrant if a candidate, or anyone else for that matter, is suspected of violating the law. The first question for the court is not whether the state's interest is great enough and its chosen method effective enough to outweigh the privacy interests involved. Rather, it is whether, under Von Raab, the circumstances in this case give rise to a special governmental need beyond the ordinary needs of law enforcement in the first place. I think not, and the majority's analysis does not support its conclusion to the contrary.[3]

Essentially, the majority's justification for suspending the requirements of the Fourth Amendment is the state's interest in

officeholders who are "drug free," "honest[ ], clear-sighted[ ], and clear-thinking," as well as "appreciative of the perils of drug use" and "[] sympathetic to drug interdiction efforts." Putting aside First Amendment concerns as to whether these subjective traits, as desirable as they may be, can be legislated as valid qualifications for public office, this standard not only fails to address why ordinary law enforcement methods are insufficient to protect these interests, but it makes suspicionless searches the rule and obtaining a warrant almost always irrelevant.[4] Moreover, this rationale seriously erodes the Fourth Amendment's protections for many people beyond the parties involved here.

The Supreme Court has rejected such an overbroad standard in assessing the reasonableness of various governmental drug-testing schemes. In Skinner and Von Raab, the Court suspended Fourth Amendment protections only when the risks of drug impairment affected those directly on the frontline of drug interdiction efforts, or those who, if under the influence of drugs, could pose an imminent physical treat to the public. The Court found a nexus between the risks of drug use and imminent hazards to public safety, for example, where government employees "discharge duties fraught with such risks of injury to

others that even a monetary lapse of attention can have disastrous consequences." Skinner, 489 U.S. at 628, 109 S.Ct. at 1419. The Court held that railway safety is a special governmental need beyond the normal need for law enforcement and justifies the suspicionless urine testing of those employees whose drug and alcohol abuse can "cause great human loss," but noted that the regulations "narrowly and specifically" limited testing to the aftermath of a serious accident when individualized suspicion is "most impracticable," or when employees are otherwise directly involved in safety-rules violations. Id. at 622, 631, 109 S.Ct. at 1416, 1420-21. Moreover, the Court upheld drug testing only after a showing of past history linking drug and alcohol abuse with serious train accidents. Id. at 606-08, 109 S.Ct. at 1407-08.

In Von Raab, the Court likewise required such a nexus in upholding suspicionless urine testing of Customs employees who are involved directly in enforcing drug laws, or are required to carry firearms. Von Raab, 489 U.S. at 670-71, 109 S.Ct. at 1393. While the Court found compelling the Customs Service's interest in "ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgement," it also specifically explained how that compelling interest would

be undermined by unlawful drug use among such front-line personnel: "A drug user's indifference to the Service's basic mission, or, even worse, his active complicity with malefactors, can facilitate importation of sizable drug shipments or block apprehension of dangerous criminals." Von Raab, 489 U.S. at 670, 109 S.Ct. at 1393. The Court recognized that "the public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force." Id. at 671, 109 S.Ct. at 1393 (emphasis added).

The narrow focus of these exceptions was reaffirmed in Vernonia School District 47J v. Acton, ___U.S.___, 115 S.Ct. 2386 (1995). The Court held that special governmental needs justify randomly testing the urine of schoolchildren, who hold a diminished expectation of privacy in the public school custodial setting, but noted that "it must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high." Acton, 115 S.Ct. at 2395 (emphasis added). Thus, it appears that even (unathletic) schoolchildren enjoy greater

Fourth Amendment protections than the majority accords the candidates in this case.

There is nothing so special or immediate about the generalized governmental interests involved here as to warrant suspension of the Fourth Amendment's requirement of individualized suspicion for searches and seizures. There are no exigent circumstances. There is no imminent threat of grave physical harm. The prospective candidates are not on the frontlines of drug interdiction. And, we cannot ignore that candidates are subjected to the ultimate screening program--the voice of the electorate. Thus, I believe the majority errs in concluding that a special governmental need beyond the normal need of law enforcement is present in this case.

In addition to being troubled by the majority's assumption that a special governmental need beyond the normal need for law enforcement exists which makes obtaining a warrant impractical in this case, I am troubled by the majority's assessment and balancing of the competing interests involved. This case presents a more serious constitutional question than that in Von Raab and Skinner. In balancing the privacy interests of the employees in Von Raab, the Court recognized that Customs officers already

agree to undergo intrusive screening as a condition of employment: "Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity." Von Raab, 489 U.S. at 672,109 S.Ct. at 1304 (emphasis added). The Court likened the necessity in those circumstances to the "extraordinary assurances of trustworthiness and probity" and "intrusive inquiries into . . . physical fitness" required of those who undertake "special positions" such as in our military or intelligence services. Id. at 671, 109 S.Ct. at 1394. In Skinner, the Court likewise recognized that "the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees." Skinner, 489 U.S. at 627, 109 S.Ct. at 1418.

I recognize that employment choices may indeed diminish expectations of privacy. An individual need not choose to become a drug interdiction agent, military intelligence officer, or railway engineer, thereby avoiding the intensive training and intrusive screening required by that particular job. But, an

individual does not have a constitutional right to a specific kind of employment. The Constitution, however, protects participation in government. While candidates relinquish to the people a great deal of their privacy in choosing to run for public office, the price should not include sacrificing one's Fourth Amendment right to be free from unreasonable searches and seizures.

In conducting the Von Raab balancing test, the majority fails to adequately consider the totality of the government's "interference with individual liberty." Von Raab, 489 U.S. at 671, 109 S.Ct. at 1393. Not only is the privacy surrounding an individual's bodily functions at stake, but all of the rights associated with participating in a democracy--rights of association, freedom of speech, ballot access, and the right to cast a effective ballot. We are not dealing merely with the denial of a job opportunity, but with the denial of opportunity to participate in our democratic form of government. In light of the interference with these liberty interests, given the governmental interests here the greater weight seems especially unreasonable.

Finally, I am concerned about the majority's conclusion that the government's actions in this case do not violate the First

Amendment. The majority maintains that the government's purpose is not suppression of free expression. Yet, it supports its holding by citing the importance of ensuring that elected officials are "persons appreciative of the perils of drug use" and "[]sympathetic to drug interdiction efforts." Establishing a certain ideology as a "qualification" for holding public office appears to be a content-based restriction on free expression.[5] Drug policy is a politically charged issue confronting many government officials who have disparate points of view regarding the "Drug War" and the efficacy of the means employed in fighting it. It is the function of public office holders to write, enforce, and interpret the laws, including drug laws. By conditioning holding public office upon submission to drug screening, however, the Georgia legislature effectively bans from positions of political power not only those candidates who might disagree with the current policy criminalizing drug use, but also those who challenge the intrusive governmental means to detect such use among its citizenry. This statute is neither neutral nor procedural, but, in the majority's own characterization, attempts to ensure that only candidates with a certain point of view qualify for public office.

It is beyond peradventure that a bodily search is significantly intrusive. It is almost equally obvious that the means utilized here

would not accomplish the goals purportedly justifying the search.[6] Thus, this search is more a symbolic gesture than an effective tool to ferret out drug-users or assure exemplary public officials.[7] Surely, symbolic gestures are not enough to trump the constitutional imperatives of the Fourth Amendment or the right to participate in government.

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[1] Whether "[s]pecial needs are involved" in this case is determined not by how urine test results will be used against any particular candidate, but by whether the "need" for such testing is already served by ordinary law enforcement, and is of such a "special" nature as to render the Fourth Amendment's warrant requirement impracticable.

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[2] O.C.G.A. § 21-2-140 bars from public office either candidates who refuse to take the best because they are ideologically opposed to the government's intrusion upon their privacy, or candidates who fail the test and are thereby only suspected of having committed a crime.

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[3] The majority's reference to the Tenth Amendment interest in setting qualifications for public office misses the point. Georgia's power under the Tenth Amendment to regulate its electoral process is not absolute. As the majority notes, the state's power to do so is subject to federal constitutional limitations, the extent of which are at issue here.

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[4] Under this standard, what Fourth Amendment protections would candidates retain to prevent suspicionless testing to research for a physical or mental impairment, AIDS, alcohol or prescription drug abuse, screening DNA for genetic information, or to prevent warrantless invasions of homes to search for drugs, pornography, or other contraband?

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[5] The Supreme Court struck down a previous attempt by the Georgia legislature to disqualify a citizen from public office on the basis of his ideology, noting that: "Madison and Hamilton

themselves should be treated similarly."

Edith M. Shine, Legislative Review, 9 Ga. St. U. L. Rev. 212, 218 (1992) (citing Telephone Interview with Rep. Bob Holmes, House District No. 28 (Apr. 10, 1993) (footnotes omitted).

Representative Holmes stated that the legislation was proposed in response to similar legislation that required school teachers to undergo urine testing because it was unfair to subject teachers to urine tests unless the politicians enacting such a law also were tested. Id. at 218 n.61. Nonetheless, the law did not apply to politicians who are already in office, but only to prospective candidates for those offices. In any event, the Applicant Drug Screening Act, which precipitated the mandate for suspicionless testing of political candidates, was struck down later as an unconstitutional infringement of employment applicants' Fourth and Fourteenth Amendment rights. Georgia Ass'n of Educators v. Harris, 749 F.Supp. 1110, 114 (N.D. Ga. 1990) (holding generalized governmental interest in maintaining drug-free workplace not sufficiently compelling so as to outweigh applicants' Fourth Amendment rights).

On a final note, Representative Holmes' comments are incapable of "chang[ing] the legislative intent . . . expressed before the Act's passage," as in Blanchette v. Connecticut General Insurance Corps., 419 U.S. 130, 132, 95 S.Ct. 335, 353 (1974) because, as the majority notes, no "official" history of legislative intent exists. Rather, this case is closer to Galvan v. Press, 347 U.S. 522, 526-27, 74 S.Ct. 737, 740 (1954) (relying on 1951 memorandum by Senator McCarran in interpreting ambiguous legislative intent of 1950 statute he sponsored). We are left, therefore, with the wisdom of Mr. Chief Justice John Marshall that "[w]here the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived." United States v. Fisher, 2 Cranch 359, 386, 2 L.Ed. 304 (1805) (quoted in Consumer Product Safety Commission v. GTE Sylvania.

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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

WALKER L. CHANDLER; SHARON T. HARRIS;

JAMES D. WALKER;

versus Civil Action No. 1:94-CV-1298-ODE

ZELL D. MILLER, Governor; MAX CLELAND,

Secretary of State; JAMES G. LEDBETTER,

Commissioner Department of Human

Resources State of Georgia,

ORDER

This civil action is before the court on Plaintiffs' motion for a preliminary injunction. Both sides filed briefs in support of their

positions pursuant to the court's order of May 24, 1994. The court heard from both sides at a hearing in open court on June 17, 1994.

Plaintiffs, members of the Libertarian Party, are candidates for state office in Georgia. plaintiff Walker L. Chandler seeks the office of Lieutenant Governor. Plaintiff Sharon T. Harris seeks the office of Commissioner of Agriculture. Plaintiff James D. Walker seeks the office of Representative, 85th House District, General Assembly of Georgia.

Plaintiffs seek a declaration that O.C.G.A. §21-2-140 is unconstitutional, coupled with an injunction forbidding Defendants from enforcing §21-2-140. In brief, the challenged statute requires candidates for state office "to certify that such candidate has tested negative for illegal drugs." §21-2-140(b). Plaintiffs allege that §21-2-140 conflicts with several provisions of both the federal and Georgia constitutions. However, both sides have focused their arguments on Plaintiffs' claim that §21-2-140 violates their rights under the Fourth Amendment to the federal constitution.

A preliminary injunction is an extraordinary remedy which should only be granted if the moving party clearly establishes: (1) a substantial likelihood that he will ultimately prevail on the merits; (2) a showing that he will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to him outweighs whatever damage the proposed injunction may cause the opposing party; and (4) a showing that the injunction, if issued, would not be adverse to the public interest.

Cunningham v. Adams, 808 F.2d 815, 819 (11th Cir. 1987). The Court first addresses whether Plaintiffs have shown that they have a substantial likelihood of prevailing on the merits of their Fourth Amendment claim.

The Fourth Amendment prohibits unreasonable searches and seizures. The issue before the court is whether it is unreasonable for Georgia to require candidates for state office to provide the certification at issue despite the absence of "a warrant, . . . probable cause, . . . [or] any measure of individualized suspicion." See National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989).[1] The standard that governs the court's analysis follows:

> [W]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to

> require a warrant or some level of individualized suspicion in the particular context.

Von Raab, 489 U.S. at 665-66 (citing Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 619-20 (1989)). Georgia's interest in the operation of each elective office at issue here gives rise to the "special governmental needs" that trigger the Von Raab balancing test. See Willner v. Thornburgh, 928 F.2d 1185, 1188 (D.C. Cir.) ("Railway Labor Executives, 109 S. Ct. at 1414, on which Von Raab relied in formulating the [balancing test], stated that the government's interest in the 'operation of a government office' -- here the Department of Justice -- presents such 'special needs.' 109 S. Ct. at 1390."), cert. denied, __ U. S. __, 116 L. Ed. 2d 760 (1991). For the reasons that follow, the court is persuaded that the importance of the offices sought, as well as the relative unintrusiveness of the testing procedure at issue, make it unlikely that Plaintiffs will prevail on their claim that §21-2-140 violates the Fourth Amendment.

In Von Raab, the Supreme Court noted that the use of illicit drugs is "one of the greatest problems affecting the health

and welfare of our population." Id., 489 U.S. at 668. The Supreme Court thus sanctioned the suspicionless testing of Treasury Department employees who sought 'promotion to positions directly involving the interdiction of illegal drugs, or to positions that require the incumbent to carry a firearm." Id. at 679. The Supreme Court reasoned that

> [t]he Government's compelling interests in preventing the promotion of drug users to positions where they might endanger the integrity of our Nation's borders or the life of the citizenry outweigh the privacy interests of those who seek promotion to these positions, who enjoy a diminished expectation of privacy by virtue of the special, and obvious, physical and ethical demands of those positions.

Id.

The offices at issue in this case do not require the

occupants to use a firearm; nor are the offices frontline positions in the effort to interdict the drug trade. Nevertheless, the offices are held by persons who are the elected representatives of the people of the State of Georgia. From this fact, the court does not believe it can be disputed that the offices are more than ordinary government jobs; i.e., the offices are "special." More- over, all of the offices place ethical demands on the incumbents that do not attend regular government jobs.[2] Given these facts, Georgia is justifiably concerned that those who seek elective office not be drug abusers, both because of the power many elected officials have to influence the effort to interdict the drug trade (through, for example, the legislative process), and because of the negative societal effects (such as cynicism and despair) which would flow from the revelation that an elected official is a drug abuser.

The foregoing analysis shows that valid, compelling concerns motivated Georgia to impose §21-2-140's certification requirement. The court balances the intrusiveness of the certification requirement against these valid, compelling concerns. In their brief, Defendants point out that

> the specimen is produced by the candidate

under circumstances which are largely under the candidate's control. The candidate can control the date and time the specimen is produced, and can and does control the location where the specimen is produced, to include any number of medical testing laboratories across Georgia, as well as the offices of the candidate's personal physician. There certainly is no threat, coercion or force involved, the only motivation for the testing, as far as the candidate is concerned, being the desire to qualify and run for state office.

(State Defendants' Brief in Response to Plaintiffs' Assertions at 3-4)[3] Once the candidate produces a specimen, the only governmental intrusion is a chain-of-custody requirement. After the test is performed, the candidate receives his certificate, presumably through the mail. Since the Candidate controls whether or not the certificate is filed, there is no compulsory

dissemination of the information contained in the certificate. Thus, if the urinalysis reveals a positive result for drugs, the candidate will not be able to qualify, but no one need know that the reason for the lack of qualification is the positive drug result. Given these facts, the court finds that the steps necessary for Plaintiffs to comply with the certification requirement would consist at most of a de minimis intrusion on Plaintiffs' privacy.

Based on the foregoing analysis, the court finds that Defendants likely would prevail on the Von Raab balancing test. The Court now turns to Plaintiffs' contention that §21-2-140 should be invalidated because it fails to accomplish the goal of preventing drug abusers from seeking and holding public office.

Plaintiffs argue that the enforcement of §21-2-140 should be enjoined because the statute will not achieve its presumed goal of barring drug abusers from public office. Plaintiffs note that since the test date is no secret, a drug abuser can abstain from the use of drugs before the test so as to achieve a negative result. Plaintiffs also note that a one-time test will have no effect on drug abuse that occurs after the test. Finally,

Plaintiffs note that there is the potential for adulteration of urine samples given the latitude accorded candidates in producing the samples at their doctors' offices.

The Court need not address Plaintiffs' arguments, for the Supreme Court's decision in Von Raab persuades the court that those arguments do not justify enjoining enforcement of §21-2-140 as an irrational law. The Supreme Court knew the plan at issue in Von Raab only contemplated a one-time drug test, for it recognized the dissent by a judge on the Court of Appeals panel that "persons already employed in sensitive positions are not subject to this test." Id. at 664.[4] Moreover, the Plaintiffs in Von Raab advanced some of the same arguments as Plaintiffs do here. Id. at 673 ("Petitioners contend that . . . illegal drug users can avoid detection with ease by temporary abstinence or by surreptitious adulteration of their urine specimens.")[5] Nevertheless, the Supreme Court rejected these arguments and concluded its opinion by holding that :suspcionless testing of employees who apply for promotion to positions directly involving the interdiction of illegal drugs, or to positions that require the incumbent to carry a firearm, is reasonable." Id. at 679 (emphasis added). Given this precedent, the court cannot

question the validity of §21-2-140, since the alleged infirmities in it are essentially the same as those that were alleged to exist in the plan at issue in Von Raab.

Accordingly, Plaintiffs' motion for a preliminary injunction is DENIED.

SO ORDERED, this 21st day of June, 1994.

s/ Orinda D. Evans

United States District Judge

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[1] Defendants do not concede that the urinalysis certification at issue constitutes a search for purposes of the Fourth Amendment. Nevertheless, Defendants analyze the certification as if it did involve a search and contend that there is no constitutional violation.

[2] Cf. Ga. Const. art. I, §II, ¶I ("Public officers are the trustees and servants of the people and are at all times amenable to them.").

[3] At the June 17 hearing, Plaintiffs conceded the accuracy of the foregoing description of the method for collecting a urine specimen.

[4] The majority members of the Court of Appeals panel rebutted the dissent's objection as follows:

> Our brother . . . advances as a basis for his dissent that the test is not sufficiently effective in other ways: employees

currently in sensitive positions are not tested and those transferred to sensitive positions are not again tested. Employees in sensitive positions are, however, subject to supervision that may be more intensive than employees in routine tasks. Moreover, offsetting the lesser effectiveness that is achieved by testing only applicants for sensitive jobs is the fact that these persons have volunteered for the jobs and have, in effect, by not withdrawing after notice, at least acquiesced in the test. The dissent, inconsistently it seems to us, argues that the testing program would be more likely to be constitutional if it were more pervasive and more invasive of privacy.

National Treasury Employees Union v. Von Raab, 816 F.2d 170, 180 (5th Cir. 1987), aff'd in part and vacated in part, 489 U.S. 656 (1989). The Court finds that many of the arguments made above apply in this case, given the scrutiny that the holders of elective office experience.

[5] In fairness, the court notes that the sample collection procedures in Von Raab were considerably more stringent than those that exist here.

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

WALKER L. CHANDLER; SHARON T. HARRIS;

JAMES D. WALKER;

versus Civil Action No. 1:94-CV-1298-ODE

ZELL D. MILLER, Governor; MAX CLELAND, Secretary of State; JAMES G. LEDBETTER, Commissioner Department of Human Resources State of Georgia,

CONSENT ORDER AND FINAL JUDGMENT

This cause came on to be heard on Joint Motion of the Parties for Entry of Final Judgment. This Court entered an Order on

June 21, 1994 denying Plaintiffs' motion for a Preliminary injunction. In order that Plaintiffs may immediately appeal this Order, the parties have submitted a proposed Consent Order and Final Judgment which this Court adopts and approves in its entirety.

Accordingly, this Court incorporates its findings of law included in its Order of June 21, 1994 and adopts the following statements as its finding of facts. on the basis of these findings of facts and of law and in accordance with the Joint Motion of the Parties for Entry of Final Judgment, this Court enters Final Judgment in favor of Defendants.

This Court makes the following findings of fact:

1. During the 1990 session of the General Assembly of Georgia, O.C.G.A. § 21-2-140 was enacted which requires any person seeking to qualify for nomination or election to a state office to file a certificate stating that the candidate has been tested for illegal drugs within 30 days prior to qualifying and that the results of the test are negative. (Copy of O.C.G.A. § 21-2-140 attached as Exhibit A.)

2. Under O.C.G.A. §21-2-140(a)(4) the state offices to which the testing requirement applies are: the Governor, Lieutenant Governor, Secretary of State, Attorney General State School Superintendent, Commissioner of Insurance, Commissioner of Agriculture, Commissioner of Labor, Justices of the Supreme Court and Judges of the Court of Appeals, judges of the superior courts, district attorneys, members of the General Assembly, and members of the Public Service Commission.

3. The statute requires the collection and testing of the fluid samples administered in a manner equivalent to that required by the Mandatory Guidelines for Federal Workplace Drug Testing Programs (HHs Regulations, 53 Fed. Reg. 11979, et seq.) or professionally valid procedures.

4. Candidates for the offices listed above are informed that the required testing may be conducted either on the site of an approved medical testing laboratory or in the privacy of the candidate's physician's office. The procedures included in the above Federal Regulations for collection of the specimen are adhered to at both collection sites, including those intended to guarantee the privacy of the potential candidate.

5. The specimen is sent by the lab or the physician's office to an approved laboratory for testing. All chain of custody procedures are complied with fully. (Id.) A five panel drug screen is performed. The certificate contemplated by the statute does not include a detailed chemical analysis of the candidate's urine, or other bodily fluids, but merely provides that a drug screen has been performed and that the results are negative, except as necessary to explain any positive drug test results.

Accordingly, the Joint Motion of the Parties for Entry of Final Judgment is hereby GRANTED and FINAL JUDGMENT is entered in favor of Defendants.

SO ORDERED, this 31st day of January, 1995.

s/ Orinda D. Evans

United States District Judge

O.C.G.A.

21-2-140. Mandatory drug testing for candidates.

a) As used in this Code section, the term:

(1) "Candidate" means any person seeking to qualify for nomination or election to a state office in this state.

(2) "Established drug test" means the collection and testing of bodily fluids administered in a manner equivalent to that required by the Mandatory Guidelines for Federal Workplace Drug Testing Programs (HHS Regulations, 53 Fed.Reg. 11979, et seq., as amended) or other professionally valid procedures approved by the commissioner of human resources.

(3) "Illegal drug" means marijuana or any of the following controlled substances included in Schedule I or II of Code Section 16-13-25 or 16-13-26: cocaine, opiates, amphetamines;or phencyclidines, except when used pursuant to a valid prescription or when used as otherwise authorized by state or federal law.

(4) "State office" includes the office of any of the following: the Governor, Lieutenant Governor, Secretary of State, Attorney General, State School Superintendent, Commissioner of Insurance, Commission of Agriculture, Commissioner of Labor, Justices of the Supreme Court, Judges of the Court of Appeals, judges of the superior courts, district attorneys, members of the General Assembly, and members of the Public Service Commission.

(b) Each candidate seeking to qualify for nomination or election to a state office shall as a condition of such qualification be required to certify that such candidate has tested negative for illegal drugs.

(c) At the time a candidate for state office qualifies for

nomination or election, each such candidate shall file a certificate with the officer with whom such candidate qualifies stating that such candidate has been tested for illegal drugs as required under this Code section within 30 days prior to qualifying for nomination or election to state office and that the results of such test are negative. Such certificate shall be in a form approved by the Secretary of State from a laboratory listed by the commissioner of human resources under subsection (e) of this Code section. Such tests shall be conducted at the expense of the candidates; provided, however, that upon submission of a valid pauper's affidavit and a valid receipt, a candidate shall be reimbursed by the Secretary of State for the cost of such test in an amount not to exceed $50.00. No candidate shall be allowed to qualify for nomination or election to a state office unless he or she presents such certificate for filing at the time of such qualification.

(d) The certificates required under subsection (c) of this Code section shall be filed with the Secretary of State and shall be available for public inspection. If a candidate qualifies with apolitical party for nomination or election to a state office, such party shall submit all such certifications to the Secretary of State

at such time as such candidates are certified by the party to the Secretary of State. Such certificates shall be maintained by the Secretary of State for a period of three years.

(e) The commissioner of human resources shall be authorized to establish guidelines governing the administration of drug tests performed pursuant to this Code section and shall maintain a list of those laboratories qualified to conduct established drug tests.

(f) The commissioner of human resources and the Secretary of State shall be authorized to promulgate rules and regulations to carry out the provisions of this Code section. (Code 1981, § 21-2-140, enacted by Ga. L. 1990, p. 2015. § 1; Ga,. L. 1992, p. 1612, §§ 1-3/)